

Averting Revictimization of Children

State Funding Needed for Independent Counsel Representing Children in Juvenile Court

Most courts and practitioners in the juvenile dependency system accept the premise that the courts have a moral imperative to ensure that abused, neglected, and abandoned children are protected and not revictimized by the dependency system. The legal structure we have in place has the potential to protect these children. Yet when we judge it by how children fare in out-of-home care as a result of our legal intervention, we find that it falls short in a number of respects. While some would argue for tearing down the legal structure and eliminating such costly protections as court-appointed counsel, this article argues that we have not provided the local juvenile courts with adequate resources to fulfill their mission.

The article is organized in three sections. The first provides the historical context for why children in dependency cases should have independent counsel. By tracing the legislative history of legal representation in dependency cases, this section argues that not only did the Legislature intend to provide independent counsel for all children in these proceedings, but it also understood that without that representation the juvenile court would be unable to adequately serve all the children under its jurisdiction. The second section illustrates how, despite the good intentions of all the participants in the court system, some children are inadvertently harmed by the very system established to protect them. The last section shows both why and how the key stakeholders can correct this injustice. The article concludes by recommending practical steps for key stakeholders to take to redress this wrong.

HISTORICAL CONTEXT FOR COURT-APPOINTED COUNSEL IN JUVENILE COURT ABUSE AND NEGLECT PROCEEDINGS

This section explores why children in abuse and neglect proceedings in California do not have an automatic right to independent counsel in all cases and provides support for instituting that right by tracing the historical and political changes behind it. It argues that we have an obligation to minimally protect children by appointing independent counsel who are both adequately funded and trained if we expect our local juvenile courts to ensure that our legal interventions do not revictimize children.

INTERNATIONAL AND CONSTITUTIONAL LAW ARGUE FOR INDEPENDENT REPRESENTATION¹

Under article 12 of the 1989 United Nations General Assembly *Convention on the Rights of the Child*,² governments should guarantee certain minimum rights to children:

- (1) the right to express his or her views freely in all matters affecting him or her;



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With the passage of Assembly Bill 233, the Lockyer-Isenberg Trial Court Funding Act of 1997, the local juvenile courts, the Judicial Council, and the Legislature in California have an opportunity to adequately fund the juvenile courts throughout the state. While AB 233 requires the state to fund all future growth in court operations costs, the Legislature reserved judgment on which expense items are included within the definition of court operations. Costs for court-appointed counsel representing children and indigent parents in dependency matters are currently defined as "trial court operations" expenditures. Therein lies the problem. The Legislature may decide to treat dependency representation costs like criminal defense costs and shift them back to the counties. This article argues that all children should have independent representation and that these costs should continue to be borne by the state rather than the counties. The article

recommends that juvenile courts and practitioners reach a consensus on minimum legal service standards and that the Legislature appropriate adequate funding for independent counsel for all children in dependency care.

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(2) the right to have those views considered and given due weight in accordance with the age and maturity of the child; and

(3) the right to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.³

According to the Convention, children have a right to have their views considered in abuse and neglect proceedings and to have representation in a manner consistent with our nation's Constitution and state laws.

Turning to the rights of children under the U.S. Constitution, we find that while the federal due process clause of the Fourteenth Amendment⁴ protects adults from unnecessary governmental intrusion, its application to children has not been interpreted so broadly. Case law interpreting constitutional protections afforded to adults sheds light on what protections ought to be afforded to children. In the seminal case of *Lassiter v. Department of Social Services*, the Supreme Court held that

Indigent parents have a due process constitutional right to representation by counsel on a case-by-case basis when the result of a hearing may be termination of parental rights; such constitutional right will depend on the complexity of the issues and likelihood that counsel might sway the outcome or that the petition contains allegations that could result in criminal charges against the parent.⁵

In *Lassiter* the Supreme Court found that the U.S. Constitution allows a case-by-case determination of the parental right to appointed counsel in termination proceedings, rather than guaranteeing that right in every case.⁶ The Court recognized that informed public opinion recommends, and most state statutes provide, appointed counsel in termination proceedings.⁷ The Court noted, however, that the decision whether to impose mandatory appointment should be left to each state.⁸

California jurisprudence has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but also in dependency and neglect proceedings.⁹ The courts have arrived at this broad protection in noncriminal proceedings by applying a three-part balancing test set out in the Supreme Court case *Mathews v. Eldridge*.¹⁰ By weighing the following interests, the court determines whether or not the privacy interest at stake rises to the level of constitutional protection:

The private interest at stake;

The risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of the additional or substitute procedural safeguards; and

The government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.¹¹

Under the California Constitution, the state supreme court has added an additional factor to the test enunciated in *Mathews*: "the dignity interest of individuals in being informed of the nature, grounds, and consequences of the action and being able to present their side of the story."¹²

Children's rights are coextensive with adult rights when the government seeks to deprive them of liberty interests.¹³ Therefore, children are guaranteed a right to counsel in all critical stages of delinquency proceedings where there is a risk of deprivation of liberty (i.e., government confinement).¹⁴ While there is no similar right in abuse and neglect cases for children, the analysis the courts have used to

determine that adults have the right to counsel, when applied to children, argues for the same legal protection.

The child's interests that are affected by governmental intrusion in an abuse and neglect case are

■ An interest in being free from abuse:¹⁵

"[Children] have compelling rights to be protected from abuse and neglect."¹⁶

■ An interest in growing up with their families:

A child's family is his or her birthright, whereas the child's parent has a legal interest in his or her child.¹⁷

The California Supreme Court has described the child's interest in his or her family as comparable to the parent's interest in that "children have a fundamental independent interest in belonging to a family unit"¹⁸ and consequently share the parent's interest "in avoiding erroneous termination [of the family unit]."¹⁹ One Court of Appeal decision went as far as finding that children do have a cognizable liberty interest in their familial relationship.²⁰

■ An interest in a swift and legally permanent plan:

The California Supreme Court has acknowledged the legislative policy of providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful and has described this permanency interest as a compelling one.²¹ The Supreme Court recognized that a child has a fundamental interest in the opportunity to have a stable relationship with a caregiver which resembles a parent-child relationship.²²

■ A dignity interest in being informed and having a voice:

The child has a dignity interest in being informed of the life choices being explored on his or her behalf by all the professionals in the system, and these same professionals have an obligation to hear the child. Whether or not the child is appointed an attorney, each local juvenile court is expected under Welfare and Institutions Code section 317.6 to establish "[p]rocedures for informing the court of any interests of the minor that may need to be protected in other proceedings."²³

Weighing what the child has at stake in these proceedings, the trend in the courts has been to affirm that the child's liberty interests are at least comparable to the parent's liberty interests. Arguably, the child's liberty interests are greater than that of his or her parent's because every decision the court makes will affect the child's current situation and future life. Decisions to remove children from their parents, to place them out of their homes, and to

move them from placement to placement affect them in many ways that sometimes do irreparable harm. The next section of this article explores some of the types of harm children suffer in the system and posits that some of the harm might be prevented if children had independent counsel who were well trained and adequately funded.

In conclusion, international law would seem to direct that children be afforded representation consistent with state law. In California, parents have a statutory right to independent counsel in dependency cases—a right that at certain times rises to the level of a constitutional right. If we apply the same analysis that courts have used to determine that parents have a right to independent counsel, we can logically conclude that their children should have the same statutory right. And indeed, some courts have stated that the child's interests in these cases rise to the level of liberty interests and thus deserve the same level of due process protection. But while it is essential that children have a voice in abuse and neglect proceedings, the courts have not held that the juvenile court should appoint an independent attorney for every child, and the Legislature has stopped short of mandating independent counsel for all children in these proceedings. Nevertheless, national and state policies argue in favor of independent representation for children in dependency proceedings.

NATIONAL AND STATE POLICIES PROVIDE COMPELLING REASONS FOR INDEPENDENT REPRESENTATION

The prevailing national policy in this area since 1974 has been that children in abuse and neglect cases should have independent representation. Under the Child Abuse Prevention and Treatment Act (CAPTA), federal law requires, as a condition of receiving federal funds, that states provide independent representation in every case involving an abused or a neglected child that results in a judicial proceeding.²⁴ This representative is called a "guardian ad litem" and is expected to represent and protect both the rights and best interest of the child.²⁵ The idea is that the guardian ad litem has allegiance only to the child and not to any other interest. The guardian ad litem can be an attorney or a lay advocate but may not be the representative of the agency that files the abuse and neglect petition. California is one of only three states that permit the child to be represented by the same attorney who represents the agency.²⁶ Consequently, California is ineligible for CAPTA funding.²⁷

To understand why children are treated differently from their parents in dependency cases, we turn to recent legislative policy in this area. Indigent parents and their children have always had a long-standing statutory right

to court-appointed counsel at public expense in dependency and termination of parental rights proceedings, both at trial and on appeal. But while this right was extended to parents as an automatic right, it was not extended to children as an automatic right.²⁸

Senate Bill 243,²⁹ effective January 1, 1988, recognized that children and parents should receive appropriate legal representation³⁰ by adding new responsibilities for appointed counsel and clarifying the court's responsibility to determine whether a conflict of interest exists between a dependent child and the petitioning agency or other public or private counsel.³¹ The duties of counsel for the child were specified in then-section 318 and included a mandate for a personal interview of all children under 4 years of age.³²

Under SB 243, section 318 was incorporated into new section 317, which we know today as the statute governing court-appointed counsel. It defined for the first time the court's responsibility for providing counsel to indigent parents whose children have been removed or are at risk of being removed as well as for their children. The bill envisioned vertical representation for all parents and children.³³ Despite the legislative intent to provide equal procedural protections to parents and their children, the policy was never implemented. "The changes were delayed in order to allow counties adequate time to reorganize staff and to secure adequate funding pursuant to SB 709 (Stats. 1987, ch. 709) to cover any additional costs attributable to the changes contained in SB 243."³⁴ The Legislature left some issues unresolved, one of which was the source of the funding for court-appointed counsel.³⁵

At that time, children were not recognized as parties to their dependency actions. It was not until 1995 that the California Legislature in Senate Bill 783 recognized the importance of the child interests at stake in these proceedings. In SB 783 the Legislature decided that children deserved party status and all rights attendant to that status. Unfortunately, the Legislature again failed to address the funding needed for court-appointed counsel for children. The Legislature opined that "[a]ll parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel,"³⁶ and that once an attorney was appointed for the parent, guardian, or child, that attorney shall provide representation "at all subsequent proceedings before the juvenile court . . . unless relieved by the court upon the substitution of other counsel or for cause."³⁷

For more than 25 years psychological experts have sought to explain to policymakers why children in these proceedings need their own independent attorneys. In the 1973 book *Beyond the Best Interests of the Child*, one of the foundational books in the field, the authors assert that

the child must have personal representation by counsel in the court, and that counsel for the child "must independently interpret and formulate his client's interests, including the need for a speedy and final determination."³⁸ And since 1989, the American Bar Association (ABA) has stated that all children in abuse and neglect proceedings should be represented by both a lay guardian ad litem and an attorney acting as the child's legal counsel.³⁹ Under the ABA Standards for the Child's Attorney, the child's attorney is defined as a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client. The standard recognizes that the child is a separate individual with potentially discrete and independent views and thus deserves an attorney independent of the agency.

Many leading juvenile court judges agree that their role is to ensure competent representation for all children who appear in dependency proceedings. Judge Leonard P. Edwards observes that "[i]t is particularly important that children have consistent independent representation throughout their dependency. In that way someone will be able to retain the child's history . . ."⁴⁰

Over the past few decades, national and state policies have evolved in abuse and neglect cases and have elevated the child's interest to that of his or her parents as deserving of court-appointed competent counsel. Such policies support the contention that the California Legislature should make good on its promise to provide mandatory independent representation for all children in these proceedings. But despite prevailing national policies, the opinions of psychological and legal experts in the field, and the availability of CAPTA funds to defray costs, California allows discretionary appointment of counsel for children and permits the guardian ad litem for the child to also represent the agency.⁴¹

STATUTES WERE ENACTED BECAUSE OF THE PARENTS' AND CHILD'S VITAL INTERESTS

The courts have long recognized these vital interests and have stated that "[p]arents have a 'vital interest in preventing erroneous termination' of their relationship with their children (citations omitted), and that to protect that interest, few safeguards are as important as the assistance of counsel (citations omitted)."⁴² The same is true for children. The Court of Appeal in *Adoption of Kay C.* stated, "Courts have also recognized that natural children have a fundamental, independent right in belonging to a family unit."⁴³

For both the parent and the child, the initiation of a dependency action presents a substantial possibility that the child and parent will be separated, either temporarily

or permanently. As the Court of Appeal in *In re Emilye A.* expressed, “[D]ependency proceedings may work a unique kind of deprivation. Indeed, they are frequently the first step on the road to permanent severance of parental ties.”⁴⁴

The legal and real-life ramifications of reversing a juvenile court order underscores how vital the child’s interests are. Reversal of an order because of failure to appoint counsel or ineffective assistance of counsel requires that the trial court rehear the case. Since the child’s life cannot be put on hold while the system remands the case for a new proceeding, the legal remedy is often inadequate. Pending new proceedings, children lose attachments or, worse yet, learn not to attach; family relationships change and may be lost forever. As the California Supreme Court explained, “The reversal of a judgment refusing to terminate parental rights can potentially lead to the loss of such rights and may itself directly cause the loss.”⁴⁵

In reviewing the appellate rights afforded to parties, specifically those of the parent, it is clear the California Legislature has afforded parties in a dependency action the right to an appeal and the right to independent appointed counsel whenever the appeal is from an order terminating parental rights.⁴⁶

Similarly, children have the same appellate rights in their dependency actions, because they are now parties. However, without independent counsel, the Legislature has effectively held children hostage in a system designed to protect them. They have all the legal trappings, but no one appointed exclusively to protect their due process rights and safeguard them against erroneous decisions.

The legislative promise of due process for abused and neglected children, in the absence of funding for independent counsel costs, has meant that the administration of justice in these cases has not been uniform. When the Legislature failed to address the nettlesome question of funding, jurisdictions did their best to protect the interests of children, but decisions to fund court-appointed counsel was left to local politics and financially strapped counties. The effects on many of the children in the juvenile dependency system in California has been devastating and is documented in virtually every local juvenile court system.

In conclusion, due process and fundamental fairness require that children have independent counsel. National and state policies have long supported the need for independent representation for children in these proceedings. Experts agree that independent representation means an attorney for the child who does not represent the petitioning agency. California’s court-appointed counsel statute for children is inconsistent with these due process principles and long-standing policy goals.

THE CHILD’S INTERESTS ARE NOT ALWAYS ASSERTED

In the 1960s and 1970s attorneys were not generally appointed for children. It was assumed that the court as *parens patriae* (surrogate parent) would ensure that the children under its jurisdiction would be protected. And the courts believed that the procedural safeguards that exist for the parties would protect the child’s interests.⁴⁷ Over the years, however, courts have found it necessary to appoint counsel for children in more and more cases. This section suggests that the motivating factor for the courts’ decision to increase their appointments has been that procedural safeguards have proven to be insufficient in protecting the interests of children.

A court’s decisions can only be as good as the information it has before it, and it is the attorneys who generally control the flow of information to the court in any given case. So in terms of protecting the child’s best interest, it would be folly to rely on the attorney for the parent. The procedural safeguards afforded to the parent (*i.e.*, representation by counsel at every stage in the proceeding;⁴⁸ notice of all hearings;⁴⁹ clear and convincing standard for removal;⁵⁰ clear and convincing standard for reunification services;⁵¹ and independent case review hearings at which the child’s placement, case plan services, and family’s extent of progress are reviewed⁵²) cannot always protect the child. The removal standard may protect unnecessary removals of children from their homes and the standard for reunification services may protect children from parents who will never be able to safely take care of them, but independent counsel who will investigate the allegations of abuse and examine the agency’s position will ensure greater protection of children. Additionally, in spite of independent court reviews of case plan services, the court may not have all the information on how the child is faring. The parent whose child has been removed is simply unaware of how his or her child is doing in out-of-home care and cannot know whether or not the child’s physical and emotional interests are being met, and thus cannot assert them. The court may have even a greater need to know how the child is doing if he or she is at home. Without an independent attorney who will investigate whether or not the child is safe at home and has the necessary services or family support to safely remain at home, the court is severely limited in receiving accurate information from the parent’s attorney. Therefore, whether the child is living at home or is placed in out-of-home care, the child needs a representative who does not have competing interests and who can solely focus on his or her interests.

One might expect that the agency, since it is charged with the protection of all children under its care, would be able to safeguard each child's interests, but its many conflicting interests make this expectation unrealistic. These conflicting interests include (1) legal interests, such as obtaining jurisdiction through a court finding that the child is described as abused, neglected, or abandoned under the code; (2) financial interests, such as minimizing costs; (3) quasi-political, legal, and financial interests, such as meeting adoption quotas; and (4) institutional pressures to handle an ever-increasing number of cases. How these interests play out in cases can inadvertently place a child in jeopardy.

Sometimes the agency will negotiate the petition language and remove certain allegations to avoid litigating jurisdiction. The attorneys for the agency and parents have a common legal interest: settling jurisdiction. During these negotiations, the child's interests may become lost. As the court in *In re Melissa S.*, noted,

[w]hen a welfare department's social worker has recommended a minor be made a dependent child and removed from parental custody, and when a parent has entered into a "plea" arrangement, conceivably to preclude adjudication of the more serious acts alleged in the petition, both the welfare department and the parent may have an interest in letting the allegations of the petition and the substance of the report pass unchallenged. This does not, however, assure that the best interests of the minor are being served, precisely the reason that independent counsel is statutorily required.⁵³

Placement decisions are another example of where the agency might treat the child's interests as secondary to other agency interests. When the agency decides on a particular placement, its attorney, whose role is to represent the agency and also the county, may inappropriately consider specific placement costs. This can occur in counties that have contracts with certain group homes and typically use these rather than others that might be more suitable for a particular child. It can also occur in counties that do not prioritize available resources so that they may fund specialized residential treatment programs. In these instances, the child's interests conflict and sometimes lose to the county's pocketbook interests; without an attorney for the child, the court would never learn of the conflict, nor would there be an attorney to litigate the placement issue.

Since the 1980s the pendulum has shifted away from family preservation and toward permanency for children, and with this political shift has come increased funding for adoptions. There are additional federal and state funds for adoptions, and therefore, a great deal of political and financial pressure on agencies from the federal and state governments to place children for adoption. Under the

Adoption and Safe Families Act, an agency is eligible to receive \$4,000 for each foster child with a finalized adoption plus an additional \$2,000 for each special needs adoption exceeding its base year of adoptions.⁵⁴ In California, the Adoption Initiative provides additional funding to county adoption agencies for increased adoption placements. Funding allocations are based on individual county performance agreements designed to double the number of children annually placed for adoption statewide over a three-year period.⁵⁵ Statewide fiscal-year funding levels are as follows: (1) 1996–1997, \$10.6 million; (2) 1997–1998, \$26.8 million; and (3) 1998–1999, \$29.4 million.⁵⁶ The financial pressure on overworked and understaffed social service agencies may therefore make it difficult for them to keep the child's interest in reunification with his or her family in context.

Sometimes both the court and the social worker can be more predisposed to providing services to the family when the child's attorney, rather than the parent's attorney, advocates for services. This differential treatment may be because they view the child's attorney as more objective than the parent's attorney, and consequently view the services as serving the best interest of the child rather than exclusively benefiting the parents. Given this perception, in difficult cases where there are questions about the family's ability to care for their child and everyone in the system has all but given up on that family, the child's attorney may be the only person who can bring a balanced view to the court.

Consider for example, a child who is under 3 at the time of removal: in his or her case, the shortened statutory time frame for permanency may mean that the court will adopt a permanent plan at six months. In this situation, the pressure on the agency to work toward adoption is great. The social worker knows that a child under 3 can be easily adopted and also frequently views the six-month statutory period of reunification⁵⁷ as too short to permit many of the families to reverse the problems that brought them to the attention of the agency in the first place. For a social worker with this outlook on a case, it is understandable if he or she decides to give a family with older children more assistance with reunification efforts than one with a younger child.

The role of the agency is further complicated by high caseloads. Since 1988, caseloads have grown in California by 163 percent. The State Budget funds approximately 7,500 full-time-equivalent county social workers at an average annual cost of approximately \$100,000 each, including salary, benefits, and overhead.⁵⁸ Counties are required to match state and federal funds or their allocation can be reduced. According to the California Department of Social Services, local county fiscal constraints

have prevented some counties from receiving all of the federal and state money available to them.⁵⁹ Therefore, in some counties caseloads exceed the caseloads established by the state for reimbursement. The state allocates a full-time-equivalent position for a specified number of cases in five work categories: Emergency Response Assessment is 1:320; Emergency Response Services is 1:15.8; Family Maintenance Services is 1:35; Family Reunification is 1:27; Permanent Placement Services is 1:54.⁶⁰ Not only is it typical for agencies to exceed these standards, but it is also not atypical for a county to pay for additional social workers with all county funds because of how the claiming process works.⁶¹

The institutional pressure on social workers handling upwards of 50 family reunification cases is tremendous. With these kind of caseloads, social workers are forced to make difficult decisions in work priorities: families are prioritized for attention and services, investigations may be abbreviated, and risk assessments streamlined. Sometimes these decisions will be at the cost to the child. Many social workers describe their case management role as akin to triage in a hospital emergency room: Families that are perceived as having the best likelihood of succeeding in reunification are given priority, *i.e.*, more attention and services. Families that the social worker perceives as having poor chances of reunification will necessarily receive less assistance. The perception may be accurate or inaccurate either because information about the family is lacking or because of unintentional bias resulting from cultural differences. Because social workers are performing under great pressure to handle these cases appropriately, it is critical that there be a check on their perceptions and consequently their judgments. Sometimes certain assistance to a family might have made the difference between the child returning home or languishing in foster care.

Along with heavy caseloads, the responsibility of “concurrent planning”⁶² is making a social worker’s job even more difficult. With concurrent planning, the social worker is statutorily mandated to provide simultaneous services aimed at reunifying the family and at obtaining a legally permanent plan for the child unless two social workers are assigned to the case. In the face of a heavy caseload, the diligent social worker necessarily tries to be faithful to both roles but is faced with a Herculean task: pursuing both goals equally vigorously without one compromising the other. Without independent counsel for the child to assert the child’s interests in reunification and permanency as appropriate and to advocate for services, the needs of many children in the juvenile court system go unmet.

Under the doctrine of *parens patriae*, the court has an obligation to become the substitute parent and care for all

the children under its jurisdiction. Unfortunately, courts have not been given the resources they need to adequately perform this role.⁶³ A recent study concluded that California’s juvenile courts do not comply with the national resource guidelines on judicial caseloads articulated by the National Center for State Courts.⁶⁴ According to a recent statewide needs assessment, California juvenile court case-processing times do not adhere to statutory timelines.⁶⁵ Furthermore, in many jurisdictions, high caseloads and lack of resources for data collection have made it impossible for the courts to even report definitively on how many children are actually under their care at any given time, much less keep track of each child’s complex legal and psychosocial interests.⁶⁶

In conclusion, upon examining the roles of the parent, the agency, and the court, we see that none of these system participants currently has the capacity to ensure that each child’s interests are met. Without an independent attorney who can conduct thorough investigations, assess the child’s needs, and advocate for the child, there will always be children in the system who are inadvertently neglected and consequently whose lives will be unalterably affected.

TOO MANY ABUSED AND NEGLECTED CHILDREN HAVE BEEN REVICTIMIZED BY THE SYSTEM DESIGNED TO PROTECT THEM

Despite procedural safeguards, the hard work of social workers, and the best intentions of the juvenile courts, some children in the juvenile court system have been harmed by the very system designed to protect them. The system inadvertently harms a child when it neglects the child’s emotional needs at removal and fails to address the child’s emotional and physical health needs through the provision of services. It harms a child when, despite its best efforts, a child must spend extended periods of his or her life in the system, which all too often means enduring multiple placements—the agency removing the child from home after home in an attempt to find the most permanent familylike setting for the child.⁶⁷

In the last decade we have learned that while removal of very young children can be life-saving, the traumatic separation and loss affect the child’s development in profound ways.⁶⁸ Experts agree that infants who have been removed from home

react with complex emotions and behaviors that are often misunderstood, misidentified, or ignored. The frightening, bewildering, and unexpected events surrounding placement leave these children with few coping resources, given their immature ego structure, limited cognitive capacity, and the unavailability of familiar adults. Attachment research confirms that loss through separation from

the primary mothering figure frequently leaves preverbal children with anger, depression, premature independence, and often, amnesia about the event. This puts them at special risk, compounded if they are moved again ... (citations omitted).⁶⁹

The court has an obligation to ensure that the professionals who are charged with identifying and meeting the special health needs of these children are able to and are doing so. However, according to the Institute for Research on Women and Families' March 1998 report *Code Blue*, children in foster care do not receive even basic health services. The evidence shows that nearly 50 percent of the children in foster care have chronic medical conditions, such as vision, hearing, and speech problems, untreated tooth decay, skin lesions, elevated lead levels, sickle cell disease, mental health problems, anemia, asthma, and a host of other difficulties.⁷⁰ They have higher rates of acute and chronic health-care problems and developmental delays than other children.⁷¹

Although their poor health may initially be the result of harm endured while in the care of their parents, the responsibility for their continued poor health record after removal rests with all the participants in the juvenile court system, but especially the court under the doctrine of *parens patriae*. Yet foster children are not routinely assessed for medical, psychological, or developmental conditions.⁷² Medical records for foster children are poorly maintained or nonexistent, placing these children at risk for overimmunization or misdiagnosis.⁷³

Foster children are entitled to early and periodic screening (medical, vision, hearing, dental, and other screenings), diagnosis, and treatment, but most infants in the foster-care system are not receiving these services.⁷⁴ They are also eligible for early Head Start, but there are no data on how many children in foster care are enrolled in the program. If they have disabilities, they and their families are eligible for the federal special education program of early intervention for children under age three,⁷⁵ and regardless of age, supplemental security income (SSI) benefits. Foster families are eligible for child care and substance abuse treatment under federal child-care and substance abuse block grants, yet most counties do not access these funds for their foster-care children. To fill in the gap, independent counsel should be charged with finding and accessing these basic health and educational services for their clients.

We also know that while foster care is needed to protect some children from abusive situations, the reliance on it as a permanent placement has harmed children.⁷⁶ Although foster care was intended to be temporary, the reality for children entering the system in California is that 1 out of 4 will be in placement four years later.⁷⁷ In comparably large states, a majority of their foster-care

children are returned home within a year of entering care.⁷⁸ California does have a comparable reunification rate of approximately 47 percent, but we achieve it at the cost of children staying in foster care much longer than one year.⁷⁹

In 1997, of the approximately 105,000 children in foster care in California, 26,000 of them exited the system with permanent plans; of those, less than 9 percent were adopted.⁸⁰ According to the National Adoption and Foster Care Analysis and Reporting System, California's adoption rate for children in foster care is 2 percent lower than the national average.⁸¹ As compared to other states, the mean age of adopted foster children between April and September 1997 was 4.69 years in California as opposed to the national mean age of 7.09.⁸²

Infants stay longer in foster care than older children. Approximately one-third of all first entries into the system are infants (ages 0 to 6 months),⁸³ and while the median duration of a foster-care placement in California is 17.2 months, the median duration for children under 1 year is 24.4 months.⁸⁴ When infants are placed in foster care, their chances of reunification are approximately 1 in 3, whereas children ages 3 to 15 have reunification rates of 50 percent. Far too many of our young children who are removed from home at early ages are not returning home, nor are they being adopted. Statewide foster-care data show that, in 1994, 44 percent of the children who entered foster care under the age of 3 were in long-term foster care four years later.⁸⁵ This is in part because over the last decade, most of the growth in California's foster-care system has been in placements with relatives. Kin care has grown from about 20 percent of foster-care placements in the early 1980s to nearly 50 percent of all foster-care placements in 1997.⁸⁶ Children in kinship care stay in foster care longer than those in other foster-care homes.⁸⁷ While they reunify at slower rates than those in any other foster-care setting, their reunifications are more successful in that they have lower reentry rates.⁸⁸

We know, too, that when children grow up in the juvenile court system, they necessarily have multiple placements. The data on how often children are moved once they come into our system are as follows: Of the approximately 31,000 children who were in placement six months or less, 169 were moved more than five times, 402 were moved four times, and 1,565 were moved three times during their short six-month stay in care. Overall more than 3 percent of the children who have been living in foster care for over 60 months were moved more than five times.⁸⁹

Multiple placements can be the source of attachment disorder: many of these children grow up to discover that it is very difficult or nearly impossible to form intimate

relationships as adults. "Multiple placements" is a term of art in the field that refers to the agency action of moving a child from one caregiver to another or from one staff provider to another in the case of a group home. From the child's perspective, "multiple placements" refers to the many times that he or she must carry his or her life-belongings (usually packed into shopping bags), walk away from adults and other children, and leave people and surroundings that have become familiar for another strange place to live. Change becomes the norm: without people and places to depend on, everyone and everything is transitory and uncertain.

In addition to moving from home to home, children in the system are all too often separated from their siblings. More than 60 percent of foster children are part of a sibling group, and 41 percent of those are not placed with their siblings.⁹⁰

Given the fate for many children who grow up in long-term foster care and have multiple placements, it should come as no surprise that the prognosis for many of these children is not good. Foster children are 50 percent more likely to be arrested as children, 40 percent more likely to be arrested as adults for violent crime, and 33 percent more likely to become substance abusers.⁹¹ All too often children who have lived in long-term foster care exit the system at age 18 to homelessness: a recent Orange County study found that 60 percent were homeless within one year of the court's dismissal of their case.⁹²

Outcome measures for children in foster care are an indictment of our system and reveals the state as an unfit parent. As a parent, it neglects the health, education, and welfare of many of its children.⁹³ As a parent, it permits too many children to be shifted from home to home without any sensitivity to a particular child's sense of time, connection to siblings, and need for one permanent loving family.⁹⁴ And as a parent, it abandons its children at age 18, expecting them to fend for themselves despite the fact that it has not given its children the necessary life skills to care for and financially support themselves.

In conclusion, an examination of rates of removal, inattention to much-needed services, extended stays in the system, multiple placements, and lack of permanency for children reveals that the court, acting as *parens patriae*, cannot be a substitute parent and oversee each case to make sure that each and every child under its care is well cared for. Nor can the system with its procedural safeguards ensure that each child's interests remain paramount despite countervailing interests. What we know about the physical and emotional health of foster children in the system and the contributing role that the system plays in determining poor outcomes for them as they mature creates a moral imperative that we consider ways

of minimizing the harm the system inadvertently causes children.

At the same time, we recognize that the juvenile court system is overwhelmed by an impossible number of expectations: It is expected to protect children by helping their families, families who for generations have been worn down by poverty and substance abuse; it is expected to do this despite a dearth of community resources; and it is expected to find permanent homes for the children under its care when they cannot be safely returned to their parents and when adoptive families are not lining up at the courthouse door.

Resources targeted at any one of these problems would improve outcomes for children in the juvenile court system. Arguing for resources for independent counsel for children in no way minimizes the efforts local courts and their communities have made in attempting to address these problems; rather, it recognizes that the courts cannot do it alone: that they—and the child—need the assistance of an independent attorney who has special training in the legal and nonlegal advocacy skills required to properly represent a child client.

INDEPENDENT QUALITY REPRESENTATION FOR ALL CHILDREN WOULD AVERT SOME HARM AND WOULD BE COST-EFFECTIVE

There are basically three court-appointment practices in California: (1) limited appointments or no appointments for young children; (2) limited or no appointments for older children, *i.e.*, those growing up in long-term foster care; and (3) mandatory appointment without court rules or guidance on caseload standards. Some courts have opted for the first practice, figuring that if the child is too young to voice his or her wishes and direct the attorney, then there is no need to appoint an attorney for the child. In the second practice, courts have decided that the critical phases of a dependency case are from initial hearing through the permanency hearing, and that while it would be best to continue representation during the later hearings, the resources would be better spent on other services. The third practice, which is the most common, is where the court appoints an attorney for each child at the initial hearing and that attorney is expected to represent the child throughout the dependency.

In counties where very young children are not appointed independent attorneys, the prevailing wisdom is that attorneys are unnecessary because their clients cannot talk to them or direct them. In these counties, appointment practices have not caught up with the latest in child development research. We now have compelling evidence of the link between violent behavior and abuse and neg-

lect in the first two years of life. This same research shows that it is during infancy that both the physical and emotional foundations of trust, empathy and conscience, and lifelong learning and thinking are established. Given the abuse or neglect already endured by an infant prior to entry in the juvenile court system and the prognosis for this infant in foster care, an independent attorney charged solely with the protection of an infant's interests might be able to avert further harm during this critical window in the child's life.

Older children who are growing up in long-term foster care also require independent representation. Testimony from children in long-term foster care confirms that they rarely know their attorney, almost never are advised of their rights to attend and participate in their own hearings, and are generally unaware of their rights in out-of-home placement.⁹⁵ The recent report of the Little Hoover Commission found that "the State puts its investment and foster youth at risk by failing to help children 'aging out' of the child welfare system to successfully transition to self-sufficiency."⁹⁶ Many of these young people lack the financial and emotional support provided by families and cannot take care of themselves; some return to the very relative from whom the state had sought to remove them. Generally, children from intact families are not expected to emotionally and financially care for themselves by age 18; they have one or more parents and often other relatives to rely on. Yet the juvenile court system expects children who have suffered abuse and neglect from their parents and then have been revictimized by the system to fend for themselves at age 18 or 19 when eligibility for foster care terminates. Independent representation for these young people, along with services, would minimally ensure that they were not moved from their homes without their voices being heard and that they had someone on their side to explain their rights and options, counsel them, and advocate for their wishes and access services.

Recent legislation in Senate Bill 933⁹⁷ substantially increased county funding for Independent Living Skills programs, which are designed for youth 16 to 21 years of age. Unlike many other child welfare services, these programs do not require the county to match their funding. Unfortunately, many agencies and courts are currently unaware of the funding or how to access it. Similarly, young people, even if they know about this entitlement, will have difficulty accessing services without the assistance of an advocate. An attorney advocating for his or her child client should be able to obtain the following services:⁹⁸

- Programs that assist children in earning a high school diploma or its equivalent;

- Vocational training;
- Daily-living skills training;
- Career planning (job development assistance such as job referrals, job training, job fairs, workshops, conferences, career days, graduation ceremonies and retreats; payments to employer for on-the-job training; work related uniforms, transportation, tools, and supplies);
- A written transitional independent living plan that is incorporated in the child's case plan;
- Services to administer trust funds;
- Stipends or incentive payments to children for participation in independent living programs; and
- Any services or assistance that would improve the child's transition to independent living.

In some of the larger counties, it is difficult for the court to monitor the quality of legal services or the number of cases each attorney may have so as to ensure that the attorney is competently handling each case in his or her caseload. Courts that appoint counsel for children in all cases, but do not have caseload standards preventing the attorney or the attorney's firm from accepting more appointments than the firm can manage, compromise the very due process rights the courts have sought to protect. In some counties, attorneys representing children have caseloads that range from 200 to 500 cases.⁹⁹ The attorney with this kind of caseload is forced to triage cases in much the same way as the social worker, and consequently children are again neglected by the system.

While mandatory appointment of attorneys for all children in the juvenile court system will be costly, especially if minimum service requirements and maximum caseload standards are followed, in the long run it will save dollars. A study in Sacramento County conducted by the Child Welfare League of America (CWLA) supports this proposition. It found that there is a relationship between abuse and neglect and subsequent delinquent behavior in that children 9 to 12 years old known to the child welfare system were 67 times more likely to be arrested than other 9- to 12-year-olds.¹⁰⁰ An examination of the risk factors (parental incarceration, school truancy, substance abuse) revealed that they were present for children in the delinquency system in much higher proportions than children not arrested and not abused. Their profiles also closely matched those of older and more serious offenders at the California Youth Authority. The CWLA calculated that the per-child costs to the child welfare and juvenile justice systems were about \$500,000, while proven intervention early on with families cost only \$40,000.¹⁰¹ In order to ensure that abused and neglected children receive these interventions and services, we must take steps so that all

appointed counsel have manageable caseloads and all children have independent counsel who are trained, adequately compensated, and have manageable caseloads.

In conclusion, those of us who work in the system share responsibility for failing to carry out the moral imperative set forth at the beginning of this article: to ensure that children who have been abused, neglected, or abandoned are not revictimized by the very system established for their protection. An examination of the roles of the court, the agency attorney, and the parent's attorney reveals that they cannot be expected to assert the child's interests and protect the child from further revictimization by the state. Therefore, we have an obligation to ensure that children's rights are minimally protected through independent court-appointed counsel if we expect the juvenile court to fulfill its mission.

FINANCING BEFORE AND AFTER STATE TRIAL COURT FUNDING

Before the passage of Assembly Bill 233,¹⁰² the Trial Court Funding Act of 1997, the courts, like every county constituent, approached their financially strapped county governments on a regular basis and hoped their individual relationships with members of the board of supervisors would translate into sufficient funds. AB 233 was intended to provide local courts with a more stable and consistent funding source, enabling them to administer all court functions and to manage their own budgets. It is hoped that the change will foster collaboration among the local courts, the state, and the counties, thereby enabling them to engage in long-term planning.

HISTORICALLY, COURT-APPOINTED COUNSEL COSTS IN JUVENILE DEPENDENCY MATTERS HAVE BEEN THE RESPONSIBILITY OF THE STATE AND LOCAL COURTS

In 1987, the California Legislature mandated court-appointed counsel for children and parents as part of a major overhaul of the juvenile dependency system. Senate Bill 1195¹⁰³ required the Senate Select Committee on Children and Youth to convene a task force to study and recommend ways to achieve greater coordination among child abuse reporting statutes, child welfare services, and juvenile court proceedings. These reforms were adopted as part of Senate Bill 243¹⁰⁴ as a result of the task force's study and report:

- The vague language describing when the juvenile court could take jurisdiction was replaced with 10 specific grounds for declaring a child a dependent of the court;

- The fast-track procedure, with strict timelines for court review aimed at either reuniting parents with their children or terminating parental rights, was adopted; and
- Provisions were made for court-appointed attorneys representing parents and children.

The policies underlying these reforms were to "ensure more uniform application of the law throughout the state and to ensure that court intervention does not occur in situations the Legislature would deem inappropriate" and to eliminate "months and often years for the [dependent child to have the] opportunity to be placed with an appropriate family on a permanent basis."¹⁰⁵ The Legislature recognized that "once court intervention [in dependency proceedings] is determined necessary, children and parents should receive appropriate legal representation."¹⁰⁶ Owing to the constitutional concerns associated with removing children from parents, the new time-limited and clearly focused protective and/or reunification services, and permanency planning deadlines, the Legislature wanted to ensure appropriate legal representation for children and parents.¹⁰⁷ Additionally, costs of court-appointed counsel were defined as a court operational expense.

With the passage of AB 233, court-appointed-counsel costs were naturally maintained as a court operational expense. Legal representation in dependency cases is expressly included in the list of "court operations" defined by rule 810(a) of the California Rules of Court and is not within the meaning of "county-provided services" defined by Government Code section 77212.¹⁰⁸ While Government Code section 77212(a) lists "legal representation" as a county service, it defines county services as those "provided to the trial courts." Court-appointed counsel in dependency proceedings is not a service "provided to the trial court," but rather a service to a third party, the clients of the juvenile court. Where the statute includes "legal representation" as a county service, it is referring to city attorney-county counsel services to the court.¹⁰⁹ Furthermore, legal representation to court clients is semantically unrelated to the other county services listed in the statute: "auditor/controller services, coordination of telephone services, data-processing and information technology services, procurement, human resources services, affirmative action services, treasurer/tax collector services, county counsel services, facilities management, and legal representation."¹¹⁰ The category of county services would not make much sense if it included legal representation to court clients, a nonadministrative function of the court, with these other court administrative functions.

The reason that indigent criminal and juvenile delinquency defense costs, unlike dependency legal representation costs, were excluded from "court operations" under

rule 810 has to do with the historical development of these areas of law. In a criminal case, the defendant's right to assistance of counsel derives from the Sixth and Fourteenth Amendments of the U.S. Constitution. There is a well-developed body of law dating back to the 1960s explaining the constitutional requirements of effective assistance of counsel.¹¹¹ The same is true in the delinquency context.¹¹² In contrast, the right to effective assistance of counsel in the dependency arena is relatively new. The Legislature, like the courts, understands that this is a unique area of the law.

The quality of justice in the juvenile court is in large part dependent upon the quality of the attorneys who appear on behalf of the different parties before the court. The presiding judge of the juvenile court plays a significant role in ensuring that a sufficient number of attorneys of high quality are available to the parties Court-appointed and public attorneys representing children in abuse and neglect cases, as well as judges, should be specially trained or experienced (citation omitted).¹¹³

It is likely for these two reasons that the Legislature believed that the courts were in the best position to evaluate attorneys and, thus, to ensure that competent attorneys were appointed.

THE LEGISLATURE, JUDICIAL COUNCIL, AND LOCAL SUPERIOR COURTS MUST ENSURE ADEQUATE FUNDING FOR COURT-APPOINTED COUNSEL

Depending on the model of representation, California counties use one or more of the following methods to compensate court-appointed attorneys:¹¹⁴

- Flat fees
- Hourly fees
- Salaries
- Contractual fees

Historically, court-appointed counsel were paid on either a salary or an hourly basis. Over the past several years, counties have commissioned reports to identify ways to reduce these costs.¹¹⁵ Financial pressures have resulted in more counties turning to flat-fee and contractual arrangements in order to decrease and better predict overall costs. Attorneys in the field have criticized flat fees as fostering assembly-line legal services. Courts have condemned fixed fees as setting up an inverse relationship between compensation and attorney effort: those attorneys who plead early for their clients are relatively overcompensated, while those attorneys who contest the charges at trial are relatively undercompensated.¹¹⁶

Regardless of the fee arrangement a given court uses to pay for court-appointed counsel, the more salient question is whether or not it has adequate funding to attract and keep attorneys who are ethical and qualified to competently represent children. As noted in one court case, "low fees will attract only the most marginal counsel, making the juvenile court a magnet for attorneys unable to find any other type of employment."¹¹⁷ Many believe low fees force the more ethical attorneys out of practice, leaving those who take on more cases than they can possibly handle. Without court oversight of caseload standards, a given fee mechanism could result in the erosion of the practice of juvenile law. Experts agree that adequately funded and competent attorneys are key to the functioning of the juvenile court. The quality of legal representation is a critical dimension of the quality of the court process because attorneys determine the flow of information before the court.¹¹⁸

AB 233 is an opportunity, after many long years, to adequately fund this important court expense. Unfortunately, the allocation under AB 233 is based on each county's fiscal-year 1994 budget, an amount that is low for three reasons: (1) juvenile dependency cases have increased by 163 percent since the 1980s,¹¹⁹ specifically, filings have increased from 36,657 in 1994 to 37,816 in 1998; (2) costs have risen with inflation; and (3) the allocation was insufficient even by 1994 standards. It was insufficient because juvenile courts did not have the political clout to obtain adequate funding from their county boards of supervisors.

Section 24(c)(4) of the California Standards of Judicial Administration directs the juvenile court judge "in conjunction with other leaders in the legal community to ensure that attorneys appointed in juvenile court are compensated in a manner equivalent to attorneys appointed by the court in other types of cases." Section 24(b) describes the importance of the juvenile court and directs the presiding judge of the juvenile court in consultation with the presiding judge of the superior court to "work to ensure that sufficient ... financial resources are assigned to the juvenile court."¹²⁰ Thus, it is the responsibility of the entire court system to ensure that the juvenile court has the resources to adequately compensate attorneys who are appointed to represent children.

In conclusion, court-appointed-counsel costs in juvenile dependency matters should continue to be borne by the state and courts rather than by the counties in order to ensure uniformity in the application of the law, to eliminate inappropriate state intervention in the lives of families, to improve access to family reunification services and critical health and educational services for children, and to reduce the time children spend out of home so they may receive swift, permanent placements. It is time for

the Legislature to make good on its promise to adequately fund court operation expenses. Institutional memories have faded since SB 243, so it is incumbent on the Judicial Council to effectively lobby the Legislature for the funds necessary to implement appointment of counsel for all children. And it is up to the Judicial Council, working in collaboration with both the local superior courts and their juvenile court departments, to ascertain appropriate funding levels.

ADEQUATE FUNDING LEVELS ALONE WILL NOT ENSURE COMPETENT COUNSEL FOR ALL CHILDREN

Under state trial court funding, each superior court receives a block grant based on the court's fiscal-year 1994 budget. But even if the funding level is adequate because the local court provided the necessary information to properly ascertain costs and the Legislature made the necessary appropriation, there is still a risk that the amount allocated for court-appointed counsel will not be given to the juvenile court for its intended use. Historically, juvenile courts, when compared to the other superior courts, have not received their fair share of the court's resources. Evidence to support this claim is sadly apparent when one visits the juvenile courts and the other superior court facilities across the state. Indeed, the Chief Justice noted this disparity during his 1997 tour of the state's local courts.¹²¹ Juvenile court facilities are generally physically separate from the rest of the superior court, miles away and rundown. A comparison of court dockets reveals that juvenile court caseloads far exceed other civil caseloads; yet at the institutional level of the courts there is a marginalization of the juvenile court's work. Regardless of one's views on subordinate judicial officers, (*i.e.*, commissioners and referees), it is striking that in no other area of the court's business is it the norm for subordinate judicial officers to hear cases. Judges, on the whole, dread the assignment, and sometimes it is given to punish certain judges. Given that historically the work of a juvenile court has been marginalized, there is no guarantee that the superior court budget allocation, which is a block grant, will be equitably distributed so that juvenile court will receive its fair share.

Even if there were adequate funding and a way to control how the superior court spent the block grant, standards are lacking at both state and local levels to ensure that appointed counsel are competent. Rule 1438 of the California Rules of Court provided that on or before July 1, 1996, the superior court of each county would adopt local rules regarding the representation of parties in dependency proceedings.¹²² While the state court rule

defines competent counsel, requires minimum education and experience, and provides the very basic of standards, it stops short of mandating specific services to be provided by each attorney and does nothing to assist the local juvenile courts in the screening and appointment decisions they must make.

As of late 1999, 30 of the 58 counties have adopted local rules pursuant to rule 1438. For the remaining 28 counties there was no real consequence other than that they were instructed to obtain a letter granting an extension from the Chief Justice. Of those counties with rules, 18 adopted some version of the model rules promulgated by the National Association of Counsel for Children. Ten counties adopted some version of the rule proposed by the Juvenile Law Subcommittee of the Judicial Council's Family and Juvenile Law Advisory Committee. Six counties followed rule 1438's example by adopting similarly vague local rules in order to technically comply with the rule. Only two counties went beyond the two rules that were circulated as model rules and expanded on their already very specific rules on attorney standards, education, recruitment, screening, and appointment.¹²³ Without close judicial oversight and some mechanism to ensure statewide accountability, the effort in each county to prepare and adopt local rules has changed very little and amounts to pro forma due process.

Even if block grants can be crafted to ensure set-asides for juvenile court costs and local juvenile courts adopt specific rules regarding court-appointed counsel, a child's right to competent counsel may still be held hostage to local court politics. Imagine the following scenario. A small county has contracted with a firm of two attorneys, and the firm seeks to hire a part-time attorney to cover the court's growing caseload. With approval for funding from the superior court, the firm begins to recruit, whereupon the presiding judge of the superior court calls and directs the firm to hire a certain attorney for the job. While such scenarios were not unheard of before state trial court funding, the influence of the presiding superior court may become more manifest without certain statewide rules akin to regulations ensuring that politics do not enter into appointment-of-counsel decisions.

Consider another hypothetical case. A given court administration seeks to reduce costs by requiring the juvenile court to utilize video conference calls for all incarcerated parents rather than transport them to the dependency hearings. The presiding judge in charge of allocating funds might decide to disregard local juvenile court concerns for due process and divert the dollars saved to other juvenile court functions or other divisions of the superior court.

In conclusion, court-appointed-counsel costs should continue to be borne by the state as court costs. But it is not enough to simply provide adequate funding for independent representation. Specific state standards are also needed to ensure that attorneys provide minimum services to child clients. State funding must be adequate so that local courts can meet both state and local standards. Statewide accountability is necessary to ensure juvenile court allocations remain in the juvenile court budget and are not redirected as a result of local superior court decisions or politics. Accountability is needed to ensure that once the juvenile courts actually have the resources, they are spending the funding allocated on competent attorneys. It is the responsibility of the court system as an institution—both the local superior courts together with the Judicial Council—to bring about these reforms for the sake of the children who, through no fault of their own, find themselves revictimized by state intervention.

CONCLUSION

Due process and fundamental fairness cry out for a child's right to independent representation in dependency proceedings. National and state policies have consistently called for independent representation for children. Yet California's court-appointed-counsel statute in abuse and neglect proceedings is inconsistent with these due process principles and long-standing policy goals. Primarily for financial reasons, the California Legislature stopped short of requiring mandatory independent representation. By failing to address the nettlesome question of funding, the Legislature left the protection of abused and neglected children to local politics and financially strapped counties. The savings have been at too great a cost: children's lives.

Lack of resources in the juvenile court system results in the inability of the court, the attorneys for the agency, and the parent to always protect the child. Even with resources, they cannot be expected to always assert the child's interests. For financial reasons, the local juvenile courts have been unable to appoint attorneys for all abused and neglected children. Despite their best efforts, the courts have been unable to provide the necessary oversight to ensure that all children under their care are not further victimized by the very system that seeks to protect them.

In conclusion, we have an historic opportunity with the passage of state trial court funding to adequately fund this traditional court cost so that all children are appointed independent counsel who are appropriately trained and adequately compensated. The challenges will be to establish better lines of accountability between the local superior courts and the Judicial Council and to educate the Legislature on the necessity of spending more on court-

appointed counsel for children. It is the responsibility of the court system as an institution—the local superior courts, their juvenile departments, and the Judicial Council to make these reforms.

STEPS TO ENSURE INDEPENDENT REPRESENTATION WORKS FOR ALL CHILDREN IN THE DEPENDENCY SYSTEM

In order to avert some of the harm the juvenile court system inadvertently causes children under its jurisdiction, the following steps should be taken:

- The state should assume a leadership role in obtaining adequate funding for children and families in juvenile court;
- The state should pass legislation to provide for mandatory appointment of independent counsel for all children in the dependency system;
- The state should allocate sufficient funds to adequately compensate court-appointed counsel;
- The local courts should recognize and correct the long-standing neglect of the juvenile courts by allocating appropriate resources to them;
- The local courts should work with the Judicial Council to determine minimum legal service requirements, maximum caseload standards, and adequate funding levels to provide these services and adhere to standards;
- The Judicial Council, through its rule-making authority and the Trial Court Budget Commission, should mandate minimum legal service requirements and maximum caseload standards;
- The Judicial Council, through its rule-making authority and the Trial Court Budget Commission, should provide adequate funding to all of the local courts so that they can provide the mandated legal services and adhere to caseload standards;
- The Judicial Council, through the Trial Court Budget Commission, should create set-asides, *i.e.*, categorical funding for court-appointed-counsel costs;
- The Trial Court Budget Commission should allocate funding on the basis of each local court's proof that it is meeting minimum service and caseload standards; and
- The Judicial Council should assume statewide oversight to ensure accountability so that funding levels are appropriate and funds are not diverted by the local superior court away from the juvenile court.

1. "Independent representation," as used in this article, refers to an attorney for the child who is separate and independent of the petitioning agency attorney.
2. *Convention on the Rights of the Child*, G.A. Res. 44, U.N. GAOR, 44th Sess., U.N. Doc. A/44/736 (1989), reprinted in 28 Int'l Legal Materials 1456 (1989) Or see www.unhcr.ch/html/menu3/b/k2crc.htm.
3. *Id.* at 1461.
4. U.S. Const. amend. XIV, § 1.
5. *Lassiter v. Department of Social Services*, 452 U.S. 18, 27, 32–34 (1981).
6. Richard R. Terzian et al., *Now in Our Hands: Caring for California's Abused and Neglected Children* 31–32 (Little Hoover Comm'n 1999).
7. *Id.* at 33–34.
8. *Id.*
9. *Lassiter*, 452 U.S. at 25–27.
10. *Mathews v. Eldridge*, 424 U.S. 319 (1976).
11. *Id.* at 335. See also *Lassiter*, 452 U.S. at 27, accord *Cynthia D. v. Superior Court*, 851 P.2d 1307 (Cal. 1993).
12. *In re Malinda S.*, 795 P.2d 1244, 1252 (Cal. 1990) (quoting *In re Jackson*, 233 Cal. Rptr. 911 (1987) (citing *People v. Ramirez* 599 P.2d 622)); *In re Walter E.*, 17 Cal. Rptr. 2d 386 (1992).
13. *Bellotti v. Baird*, 443 U.S. 622, 634–35 (1979).
14. *United States v. Kent*, 383 U.S. 541 (1966); *In re Gault*, 387 U.S. 1 (1967).
15. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (observing that the entire society benefits when the child is "safeguarded from abuses and given opportunities for growth").
16. *In re Marilyn H.*, 851 P.2d 826, 832 (Cal. 1993).
17. "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). "[T]he child and his parents have a vital interest in preventing erroneous termination of their natural relationship." *Id.* at 760. Compare the parent's right to "the companionship, care, custody and management of his or her children" (*Stanley v. Illinois*, 405 U.S. 645, 651 (1972)) to the child's birthright.
18. *Marilyn H.*, 851 P.2d at 833 (citing *Adoption of Kay C.*, 278 Cal. Rptr. 907, 911 (1991)).
19. *Santosky v. Kramer*, 455 U.S. at 765.
20. See *Smith v. City of Fontana*, 818 F.2d 1411 (9th Cir. 1987).
21. *Cynthia D.*, 851 P.2d at 1313.
22. *Marilyn H.*, 851 P.2d at 833 (citing *In re David B.*, 154 Cal. Rptr. 63, 71 (1979)).
23. Cal. Welf. & Inst. Code § 317.6 (West 1991).
24. 42 U.S.C. §§ 5106a(b)(6), 5106c(b)(1) (West Supp. 1992).
25. 45 C.F.R. § 1340.14(g) (West 1991).
26. Cal. Welf. & Inst. Code § 317(c); Pennsylvania and Indiana do not receive CAPTA funds.
27. SB 600 (Costa) was enrolled and before the Governor for his signature, and it would have amended Welfare and Institutions Code section 326 so that California would be eligible to receive CAPTA funding.
28. See Cal. Welf. & Inst. Code §§ 317, 366.26(f) (West 1999); former Cal. Civ. Code § 237.5, now Fam. Code §§ 7860–7863 (West 1999); and Cal. Rules of Court Rule 1412(g)(h) (West 1999).
29. SB 243 (Stats. 1987, ch. 1485).
30. Leonard P. Edwards et al., *Significant Developments in Juvenile Dependency*, 1989 California Appellate Courts Inst. 2 (April 1989).
31. Senate Select Comm. on Children and Youth/Sb Task Force, *Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services* 9 (Jan. 1988).
32. Leonard P. Edwards et al., *supra* note 30, at 9.
33. Senate Select Comm. on Children and Youth, *supra* note 31, at 9.
34. *Id.*
35. Leonard P. Edwards et al., *supra* note 30, at 9.
36. Cal. Welf. & Inst. Code § 317.5 (West 1991).
37. See *id.* § 317(d).
38. Joseph Goldstein et al., *Beyond the Best Interests of the Child* 67 (Free Press 1973).
39. Howard Davidson, *The Child's Right to Be Heard and Represented in Judicial Proceedings*, 18 Pepp. L. Rev. 255 (1991).
40. Leonard P. Edwards, *Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980*,

NOTES

- in Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases 150 (National Council of Juvenile and Family Court Judges 1991).
41. See Cal. Welf. & Inst. Code § 317 (West 1991). All references to "agency" refer to the local child welfare agency in each county that files the petition describing the child as abused and neglected.
 42. Janet O. v. Superior Court, 50 Cal. Rptr. 2d 57, 62. (1996) (citing *Santosky*, 455 U.S. at 760 and *In re Bryce C.*, 906 P.2d 1275, 1279 (Cal. 1995)).
 43. Adoption of Kay C., 278 Cal. Rptr. 907, 911 (1991). See *Smith*, 818 F.2d at 1411 (children who brought an action for the wrongful death of their father deemed to have a cognizable liberty interest in their familial relationship); *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (the right to maintain the family relationship involves the "interest of the parent in the 'companionship, care custody and management of his or her children' (citation omitted), and of the children in not being dislocated from the 'emotional attachments that derive from the intimacy of daily association' with the parent. ...")
 44. *In re Emilye A.*, 12 Cal. Rptr. 2d 294 (1992).
 45. *In re Bryce C.*, 906 P.2d 1275, 1279 (1995).
 46. Cal. Welf. & Inst. Code §§ 395, 7895 (West 1999); *Bryce C.*, 906 P.2d at 1276 (Cal. 1995).
 47. Ann M. Haralambie, *Current Trends in Children's Legal Representation*, Serving the Needs of the Child Client: Keeping Pace With the Practice of Law for Children 431 (National Ass'n of Counsel for Children 1998).
 48. Cal. Welf. & Inst. Code § 317 (West 1991).
 49. See *id.* §§ 307.4, 308, 311, 316, 335-36, 364-366.23.
 50. Cal. Welf. & Inst. Code § 361(c) (West 1999).
 51. See *id.* § 361.5.
 52. See *id.* §§ 366.21 and 366.22.
 53. *In re Melissa S.*, 225 Cal. Rptr. 195, 203 (1986).
 54. 42 U.S.C. § 673b (1999).
 55. For adoption placements by county, see California Dep't of Social Services, Adoption Initiative at 1, 5 (Nov. 1998).
 56. *Id.* at 1.
 57. Cal. Welf. & Inst. Code § 361.5(a)(2) (West 1991).
 58. Terzian, *supra* note 6, at 35.
 59. *Id.*
 60. Terzian, *supra* note 6, at 36.
 61. According to an Aug. 1999 conversation with Dana Fabella, Director of Social Services, Contra Costa County, five of her social workers are paid exclusively with county funds.
 62. Cal. Welf. & Inst. Code § 16501.1(f)(9) (West 1991).
 63. National Center for State Courts, California Court Improvement Project 4 (Apr. 1997).
 64. Center for Children and the Courts, Judicial Council of California, Court Profiles, prepared for Beyond the Bench IX (Dec. 1998).
 65. National Center for State Courts, *supra* note 63, at 23-25.
 66. Court caseloads in California do not comply with the national resource guidelines. They also do not comport with the resources allocated to the national model courts. See Mark Hardin, Judicial Implementation of Permanency Planning Reform: One Court That Works (American Bar Ass'n, Center on Children and the Law 1992); Mark Hardin et al., A Second Court That Works: Judicial Implementation of Permanency Planning Reforms (American Bar Ass'n, Center on Children and the Law 1995); Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases (National Council of Juvenile and Family Court Judges 1995).
 67. California Dep't of Social Services, FCIS85, Foster Care Information System data prepared Apr. 9, 1999, and provided by Office of Data Analysis and Publications.
 68. Margaret H. Tulley et al., *Treating Loss and Separation in Infant and Toddler Foster Care*, in *Zero to Three*, Dec. 1998/Jan. 1999, at 32.
 69. *Id.*
 70. Kristi A. Olson, *Children's Health Under Medicaid*, in American Bar Association 9th Nat'l Conference on Children and the Law 32 (Apr. 1999).
 71. Judith Silver, *Improving Access to Early Intervention and Health Care Services for Infants and Toddlers in Foster Care*, in *Zero to Three*, Dec. 1998/Jan. 1999, at 27 (citing Chernoff et al. 1994; Hochstadt et al. 1987; Simms 1989).
 72. Terzian, *supra* note 6, at 81.
 73. *Id.*
 74. 42 U.S.C. § 1396(a) (West 1993).
 75. Part C (formerly Part HO) of the Individuals With Disabilities Education Act (IDEA) 1991, 20 U.S.C. § 33

(funds are provided for states to develop statewide, comprehensive, coordinated, multidisciplinary, and interagency programs that provide eligible children and their families with an individualized family service plan).

76. Terzian, *supra* note 6, at 67.

77. *Id.*

78. *Id.*

79. Terzian, *supra* note 6, at 67, 91.

80. *Id.* at 91.

81. *Id.*

82. *Id.*

83. Robert M. Goerge & Fred Wulczyn, *Placement Experiences of the Youngest Foster Care Population: Findings from the Multi-state Foster Care Data Archive, in Zero to Three*, Dec. 1998/Jan. 1999, at 11.

84. *Id.* at 12.

85. Barbara Needell, et al., *Performance Indicators for Child Welfare Services in California: 1994*, 73 (Child Welfare Research Center, U.C. Berkeley, 1995).

86. Terzian, *supra* note 6, at 75.

87. *Id.*

88. *Id.*

89. California Dep't of Social Services, *Foster Care Information System data* (June 30, 1997, to June 30, 1998), provided by the Office of Data Analysis and Publications.

90. *Id.* for fiscal year 1997–1998.

91. National Council of Juvenile and Family Court Judges Centennial press packet citing White House statistics (1999).

92. *Orange County Emancipation Programs (1997–98)*, grand jury report from James P. Kelly, foreman, at 408.

93. Cal. Dep't of Social Services, *supra* note 55, at 1, 81.

94. *Id.* at xii.

95. Child Welfare League of America, www.cwla.org/cwla/publicpolicy/1999nationalfactsheet.html, n.26 (citing CWLA 1997). Sacramento County Study Community Intervention Program: Findings from a Comprehensive Study by Community Partners in Child Welfare, Law Enforcement, Juvenile Justice, and the CWLA (Washington, D.C. 1996).

96. Terzian, *supra* note 6, at 99.

97. SB 933 (Stats. 1998, ch. 311).

98. 42 U.S.C. § 677; Draft Guidelines for the Independent Living Program (Cal. Dep't of Social Services, June 1999).

99. Informal discussions with practitioners in Los Angeles and Santa Clara Counties (June–July 1998).

100. Child Welfare League of America, *supra* note 95.

101. *Id.*

102. Lockyer-Isenberg Trial Court Funding Act of 1997 (Stats. 1997, ch. 850).

103. SB 1195 (Stats. 1986, ch. 1122).

104. SB 243 (Stats. 1987, ch. 1485).

105. Senate Select Comm. on Children and Youth, SB 1195 Task Force Report on Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services 10 (Jan. 1988).

106. Senate Select Comm. on Children and Youth, *supra* note 105, at ii.

107. *Id.*

108. Cal. Gov't Code § 77212(A) (West Supp. 37A pt. 2 1999). See drafter's intent as expressed in the "Questions and Answers Concerning Implementation of AB 233" in the *Trial Court Funding Act Resource Manual*, 2d ed. (Judicial Council of California/Administrative Office of the Courts 1998).

109. Cal. Gov't Code § 77212(A) (West Supp. 37A pt. 2 1999).

110. *Id.*

111. *Douglas v. California*, 372 U.S. 353 (1963).

112. *In re Gault*, 387 U.S. 1 (1967).

113. See Cal. Standards Jud. Admin. Section 24(i), Advisory Committee Comment.

114. Informal survey by Center for Children and the Courts, Judicial Council of California/Administrative Office of the Courts, June–July 1998.

115. Bar Ass'n of San Francisco, *A Study of Appointed Representation in Juvenile Dependency Cases in San Francisco* (Feb. 1996); Jaime Green, *Dependency Costs and Caseload* (Coro Found., Oct. 5, 1995); Linda Dobb et al., *Findings and Recommendation Regarding Cost Containment for Dependency Representation in the San Francisco Superior Court* (City Focus Program, Coro Found., Apr. 4, 1994).

116. See *In re Recorder's Court Bar Ass'n v. Wayne County Circuit Court*, Mich Sup. Ct., No 86099, Aug. 3, 1993.

- NOTES
117. *See* Trask v. Superior Court of Los Angeles County, 27 Cal. Rptr. 2d 425, 427–29 (1994).
118. Mark Hardin, *Responsibilities and Effectiveness of the Juvenile Court in Handling Dependency Cases*, in *The Future of Children* (Winter 1996), at 111, 118.
119. Goerge & Wulczyn, *supra* note 83, at 9.
120. Cal. Standards Jud. Admin., *supra* note 113.
121. Chief Justice Ronald M. George, State Judiciary Address to a Joint Session of the California Legislature (Feb. 23, 1998), at 10, 11 (Judicial Council of California/Administrative Office of the Courts).
122. Cal. Rules of Court, Rule 1438 (West 1999).
123. San Francisco and Los Angeles. Information current as of Feb. 1999.